UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 31, 2000

The Honorable Pete Sessions
United States House of Representatives
Washington, DC 20515

Dear Congressman Sessions:

The Commission is responding to your request for the Commission's comments on H.R. 3408, the "Fair Credit Reporting Amendments Act of 1999," legislation you introduced to amend the Fair Credit Reporting Act ("FCRA" or "Act") to exempt certain workplace investigations from the Act. The Commission shares your concern that the FCRA should not unduly hinder workplace investigations that are intended to foster employee protections or halt illegal activity. To that end, the Commission agrees that prudent amendments to the FCRA are desirable to remove specifically those FCRA procedural requirements that constitute potential impediments to workplace investigations conducted for employers by outside entities. The Commission believes, however, that other provisions of the FCRA, as they apply to workplace investigations by third parties, provide important rights for individuals who are accused of improprieties without hindering the ability of employers to utilize outside entities to conduct such investigations. We believe that amendments to the FCRA should strike a balance between the need to facilitate efficient, timely investigations and the need to retain basic safeguards for targeted employees.

As you know, the FCRA has been in effect for nearly thirty years and has, since its inception, applied to the collection and use of certain information for employment purposes. The Congressional statement of purpose notes that the objectives of the FCRA include the requirement "that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, *personnel*, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . ." (Section 602 (b) of the FCRA, 15 U.S.C. § 1681; emphasis added).

In 1996, Congress adopted wide-ranging amendments to the FCRA (P.L. 104-208). These changes, which became effective September 30, 1997, included substantial new requirements on users of consumer reports for employment purposes. "Employment purposes" is a term defined by Congress in the FCRA and is quite broad in its reach, encompassing personnel

actions beyond the initial employment decision.[1] Similarly, the FCRA definitions of "consumer report" and "consumer reporting agency" are expansive and thus apply to a variety of reports utilizing information for a number of purposes, including employment purposes.[2]

In the employment context, an outside entity (such as a private investigator or law firm) that regularly conducts investigations of alleged workplace misconduct by employees is very likely a "consumer reporting agency" and the report it makes to an employer is likely to be a "consumer report" within the meaning of the FCRA. Indeed, such investigations typically include interviews at the workplace, and the resultant report is thus an "investigative consumer report."[3] Additional FCRA protections apply for investigative consumer reports, including notice to the consumer that an investigative consumer report may be obtained.[4]

For any consumer report used for employment purposes, the 1996 amendments added requirements that an employer notify the consumer that a consumer report may be obtained for employment purposes, and obtain from the consumer written authorization for the procurement of the report by the employer. (Sections 604(b)(2)(A)(i) and (ii), 15 U.S.C. §§ 1681b(b)(2)(A)(i)

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[1] "The term 'employment purposes' when used in connection with a consumer report means a report used for...evaluating a consumer for employment, promotion, reassignment or retention as an employee." Section 603(h), 15 U.S.C. § 1681a(h).

[2] A "consumer report" means "any...communication of any information by a consumer reporting agency bearing on a consumer's...character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for...employment purposes...". (Section 603(d) of the Act, 15 U.S.C. § 1681a(d).) A "consumer reporting agency" ("CRA") is defined by the Act to include any person which, for monetary fees, "assembles or evaluates" credit information or other information on consumers for the purpose of regularly furnishing consumer reports to third parties using any means or facility of interstate commerce. (Section 603(f) of the FCRA, 15 U.S.C. § 1681a(f).)

[3] The FCRA has defined an "investigative consumer report" as a consumer report "in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information." The definition of an "investigative consumer report" has remained unchanged since the enactment of the FCRA in 1970. (Section 603(f) of the FCRA, 15 U.S.C. § 1681a(f).)

[4] Section 606 of the FCRA provides that a person may not procure an investigative consumer report on a consumer unless, within three days of first requesting the report, the user discloses to the consumer that "an investigative consumer report including information as to his character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made" and informs the consumer of his right to request additional disclosures of the "nature and scope" of the investigation requested. (15 U.S.C. §§ 1681d(a) and (b).)

and (ii).) Additionally, before taking any "adverse action"[5] based in whole or in part on information from a consumer report, the employer must provide to the consumer to whom the report relates a copy of the report and a written description of the consumer's FCRA rights (*e.g.*, to dispute inaccuracies in the report with the consumer reporting agency). (Sections 604(b)(3)(A)(i) and (ii), 15 U.S.C. §§ 1681b(b)(3)(A)(i) and (ii).)

With respect to investigative consumer reports, Congress made one key change in the 1996 amendments relevant to investigations of workplace misconduct. Prior to the 1996 amendments, an employer would not have had to notify an employee that an investigative consumer report may be obtained for workplace misconduct investigations, because the general notice requirement contained an exemption if the "report is to be used for employment purposes for which the consumer has not specifically applied." In the 1996 amendments, this exemption was *removed* by Congress at the same time that it added other requirements (such as disclosure and authorization) for users of all consumer reports for employment purposes.[6] The 1996 amendments therefore substantially increased the obligations on employers using consumer reports, and particularly investigative consumer reports to investigate workplace misconduct.

However, as your letter describes -- and the Commission fully appreciates -- the need for prompt, credible investigations of workplace misconduct is critical in a wide variety of employment settings. Often, the circumstances of the conduct or the needs of the employer compel or encourage investigations by outside entities. Indeed, federal and other laws and regulations require or strongly endorse such investigations, and the Commission recognizes the policy tension between the need for timely, impartial investigations and certain procedural requirements of the FCRA. Your letter identifies the new FCRA procedural provisions that are potentially most burdensome in the context of such investigations; the Commission agrees that legislation to relieve an employer of those enumerated requirements is warranted. We also believe, however, that further changes to the FCRA must retain a meaningful level of protection for individual employees who are the subject of a workplace investigation by an outside entity. To that end, the Commission believes that the best method of achieving the appropriate balance

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[5] "Adverse action" is defined in the FCRA to include "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee...". (Section 603(k)(1)(B)(ii), 15 U.S.C. § 1681a(k)(1)(B)(ii).)

[6] Congress also changed the language of Section 609(a)(1) of the Act, which now requires CRAs to disclose to a consumer, upon request, *all* information in the consumer's file (except risk scores). 15 U.S.C. § 1681g(a)(1). Previously, CRAs had been required by the FCRA to disclose only the "nature and substance" of information in the consumer's file. Section 609(a)(2), which provides that a CRA does *not* have to disclose *sources* of information acquired solely for use in preparing an investigative consumer report, remained unchanged in the 1996 amendments. However, in the context of workplace investigations, the significance of the "all information" disclosure change in 609(a)(1) means that specific information will be divulged that could permit an employee to infer the identity of interviewees and other sources, *e.g.*, among a targeted employee's co-workers.

is a statutory exemption from the specific procedural requirements rather than a broader exclusion for all employee investigations.

In assessing this issue, the Commission finds significant that FCRA safeguards for the consumer/employee who is the target of a workplace investigation have applied since the inception of the Act. These include requirements that consumer reporting agencies use reasonable procedures in the preparation of consumer reports; safeguards for accuracy and accountability; and procedures for disclosure and dispute resolution *after* adverse action. Given the grave consequences of employment decisions for the individual consumer, these protections, in place for nearly thirty years, are not unrealistic or undue requirements for consumer reporting agencies involved in workplace investigations. The FCRA safeguards are an appropriate balance to the need for expeditious investigations of alleged workplace misconduct, especially for those workers who may be the target of unfounded or erroneous accusations.

Accordingly, the Commission respectfully recommends that H.R. 3408 not exempt workplace investigation reports from *all* coverage by the FCRA[7] but instead achieve its aim by an amendment targeted more precisely to the FCRA provisions that potentially hamper timely investigations and arguably "chill" the willingness of co-workers to cooperate in the investigation of a colleague for fear of identification. One method to achieve this end would be to amend the definition of "employment purposes" (Section 603(h) of the FCRA) to provide that, in cases in which a consumer report is obtained for the purpose of investigating allegations of illegal misconduct by an employee, compliance with Sections 604(b)(2)(A) and (3)(A) and 606(a), (b), (c) and (d)(1) is not required. In these cases, compliance with Section 609(a)(1) should also not be required, except that the consumer reporting agency should be required to disclose to the employee a summary containing the nature and substance of the information in the consumer's file at the time of the request.[8]

An approach of this kind would

- remove the requirements that, prior to procuring a consumer report, the employer must disclose to the employee under investigation that a consumer report will be obtained and obtain the written authorization of the employee to

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[7] The exemption is achieved by H.R. 3408 Section 2(a)'s proposed amendment to FCRA Section 603(d)(2)(A). We note, however, that Section 2(b) of H.R. 3408 appears inconsistent with Section 2(a).

[8] The "nature and substance" of the report should allow the affected consumer to obtain a degree of meaningful, genuine disclosure of the information that served as the basis for the adverse decision. Although such disclosure need not be so specific that it could be used to identify witnesses (with consequent risk of retaliation) or otherwise inhibit the ability of an outside party to collect the information necessary for a valid workplace investigation, we do not believe that generalized or conclusory statements would constitute a good-faith disclosure of the nature and substance of a report.

procure the report. (The target of a sensitive investigation will not be alerted to the investigation nor have an opportunity to thwart the use of a third-party investigator by refusing authorization.)

• remove the requirements that, prior to taking adverse action based in whole or in part on a consumer report, the employer must provide to the consumer a copy of the consumer report and a written description of the consumer's rights under the FCRA. (An employer will be able to fire or otherwise discipline an employee without giving them, prior to the action, a copy of the consumer report.)

• remove the requirements that apply to investigative consumer reports, including notification of preparation of a report and notice of the consumer's right to request disclosure of the nature and scope of the investigation.

• remove the requirement that a consumer reporting agency that prepares an investigative consumer report must, upon request, disclose to the consumer *all* information in the consumer's file. Instead, for investigative consumer reports, the consumer reporting agency would be required to disclose the "nature and substance" of the information in the consumer's file.

This approach leaves in place (among other provisions of the Act) Section 615 of the FCRA, which requires an employer who takes adverse action against an employee based in whole or in part on any information in a consumer report to provide to the employee the name and other identifying information about the consumer reporting agency, and notice of the consumer's rights to obtain a summary of the nature and substance of the report and to dispute the accuracy of the information in the report. These actions would take place *after* the employer's action against the employee, thus removing the potential impediments to the investigation itself.

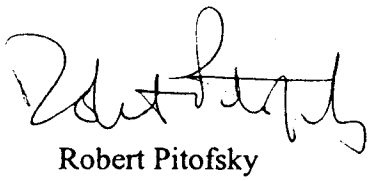
The Commission is aware of federal and other requirements that certain workplace misconduct investigations be referred to criminal authorities for further investigation. When a consumer report has figured both in the employer's decision to refer an investigation for criminal consideration and the employer's determination to take adverse action with respect to an employee, the FCRA should make some provision for deferring the adverse action notice otherwise required by Section 615. A useful analog for such an approach is provided by the "delayed notice" provisions of the Right to Financial Privacy Act, 12 U.S.C. § 3409, which provide that a consumer notice required by the RFPA may be delayed by order of an appropriate court if the court makes certain findings, including that providing the notice might result in flight from prosecution, destruction of evidence, intimidation of witnesses, or other serious jeopardy to the investigation.

Congress may wish to consider other safeguards in connection with workplace investigations and the FCRA. Specifically, to deter abuse of the exemption from various disclosure and other requirements that we recommend above, it may be useful to require further certification under Section 607(a) of the Act when a consumer report is sought in connection

with an investigation of workplace misconduct. For example, before an employer could take advantage of statutory exemptions, an employer should certify to the CRA preparing the consumer report that the report is being sought in good faith and for the specific purposes of the statutory exemptions.

In sum, the Commission supports provisions that address demonstrated impediments to conducting investigations without hampering the rights of an accused employee. The Commission agrees that the 1996 amendments to the Fair Credit Reporting Act have resulted in unanticipated conflicts between the aims of the Act and the public policy favoring prompt, objective investigations of workplace misconduct. We strongly endorse a targeted amendment tailored to those specific provisions of the Act that may genuinely impede workplace investigations by third parties. We do not believe that a blanket exemption from the entirety of the FCRA is warranted for such investigations. Because accused employees should still be protected through the FCRA's reasonable procedures and accuracy safeguards, an approach such as that suggested in this letter would strike the appropriate balance.

By direction of the Commission.



Robert Pitofsky
Chairman